

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SHANE MENSCHKE,

Petitioner,

v.

**9:01-CV-1429
(FJS/GJD)**

**WALTER KELLY, Superintendent,
Attica Correctional Facility,**

Respondent.

APPEARANCES

OF COUNSEL

SHANE MENSCHKE

98-A-2449

Gowanda Correctional Facility

P.O. Box 311

Gowanda, New York 14070-0311

Petitioner *pro se*

LAW OFFICES OF MICHAEL H. SUSSMAN

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Attorneys for Petitioner

MICHAEL H. SUSSMAN, ESQ.

**OFFICE OF THE NEW YORK
STATE ATTORNEY GENERAL**

The Capitol

Albany, New York 12224

Attorneys for Respondent

STEVEN H. SCHWARTZ, AAG

SCULLIN, Chief Judge

ORDER

By Memorandum-Decision and Order dated February 7, 2005, this Court adopted

Magistrate Judge DiBianco's Report-Recommendation, dated May 10, 2004, in its entirety and

dismissed Petitioner's *habeas corpus* petition. *See* Dkt. No. 13. By letter dated April 4, 2005, Petitioner, through counsel, requested that the Court issue a Certificate of Appealability ("COA").¹ *See* Dkt. No. 18.

Section 2253 of Title 28 of the United States Code governs appeals to the courts of appeals in *habeas corpus* proceedings. This statute provides, in pertinent part, that

- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.²

28 U.S.C. § 2253(c)(1).

A court may only issue a COA "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

¹ In the April 4, 2005 letter, Michael H. Sussman, Esq. informed the Court that Petitioner had retained him to perfect an appeal from this Court's February 7, 2005 Memorandum-Decision and Order. *See* Dkt. No. 28. Mr. Sussman filed a Notice of Appeal from that Memorandum-Decision and Order on Petitioner's behalf on March 16, 2005. *See* Dkt. No. 16.

It appears from the Court's Docket that Mr. Sussman represented Petitioner in this action until October 10, 2002, at which time he notified the Court that he had been suspended from practicing law in this District. *See* Dkt. No. 9. The Court, therefore, terminated his representation of Petitioner at that time. Subsequently, Mr. Sussman was readmitted to the practice of law in this District. However, until the Court received the April 4, 2005 letter, it was not aware that Petitioner had once again retained him as counsel. In light of Mr. Sussman's assertion that he, once again, represents Petitioner, the Court hereby instructs Mr. Sussman to file a Notice of Appearance in this action so that the Clerk of the Court may amend the Court's Docket to reflect this change.

² Rule 22 of the Federal Rules of Appellate Procedure also provides, in pertinent part, that, under these circumstances, an appeal may not proceed "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1).

After reviewing the entire file in this matter and for the reasons set forth in its February 7, 2005 Memorandum-Decision and Order, the Court concludes that Petitioner has failed to make the required showing for issuance of a COA. Accordingly, the Court hereby

ORDERS that Petitioner's application for a Certificate of Appealability is **DENIED**; and the Court further

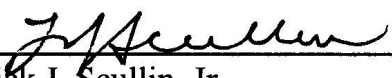
ORDERS that Michael H. Sussman, Esq., file a Notice of Appearance in this action **within ten days of the date of this Order**; and the Court further

ORDERS that, upon receipt of such Notice of Appearance, the Clerk of the Court shall amend the Court's Docket to reflect this change; and the Court further

ORDERS that, in light of Mr. Sussman's assertion in the April 4, 2005 letter that Petitioner has, once again, retained him as counsel, the Clerk of the Court shall, in addition to serving a copy of this Order upon Petitioner and Respondent's counsel, serve a copy of the same upon Mr. Sussman.

IT IS SO ORDERED.

Dated: April 7, 2005
Syracuse, New York



Frederick J. Scullin, Jr.
Chief United States District Court Judge